

## 金融法律热点问题

### 新《证券法》实施后债券市场立法和执法发展趋势

截至2020年1月，我国债券市场托管余额达到100.4万亿元，市场规模位居世界第二。产品涵盖了国债、地方债、金融债、公司信用债(即公司债券、企业债券、非金融企业债务融资工具)、同业存单、熊猫债等多类品种(见附表中国债券市场主要交易品种)。2020年3月11日，中国人民银行(以下简称“**人民银行**”)和中国证券监督管理委员会(以下简称“**证监会**”)共同就债券市场支持实体经济发展有关问题答记者问(以下简称“**《答记者问》**”)，其中针对银行间债券市场监管、投资人保护和对外开放三个方面做出了回应。本文试图根据近期动态简要梳理债券市场在新《证券法》实施后体现的立法和执法发展趋势变化。

#### 一、法律适用

《答记者问》澄清了在新《证券法》出台后银行间债券市场的法律适用，明确指出在新《证券法》出台后，银行间市场金融债券和非金融企业债务融资工具等品种的发行、交易、登记、托管、结算等仍由人民银行及其指定机构依照《中国人民银行法》等制定的现行有关规定管理。商业银行等承销机构、信用评级等中介服务机构仍按照现行有关规定在银行间债券市场正常开展业务。

以上表态说明，尽管从理论上说，新《证券法》界定的证券应包括银行间市场发行和交易的金融债券和非金融企业债务融资工具，由此新《证券法》的原则及相关条款应当适用于上述债券或债务融

资工具，但我们理解，基于实用主义的立场，中国政府已经决定在一定时期内就银行间债券市场在发行、交易、登记、托管、结算方面维持按不同市场划分的债券监管架构不变，并明确银行间债券市场仍按新《证券法》实施前的现有制度安排进行监管，也即，就现有制度安排已经涵盖的范围，新《证券法》并不适用银行间债券市场。

#### 二、统一执法

尽管《答记者问》明确银行间债券市场的现有发行、交易、登记、托管、结算制度安排不变，但这并不妨碍中国政府继续基于实用主义的立场要求各监管部门在部际协调机制下进行分工协作，并实现银行间债券市场和交易所债券市场的统一执法。

人民银行、证监会、国家发展和改革委员会于2018年12月联合发布《关于进一步加强债券市场执法工作的意见》(以下简称“**《统一执法意见》**”)，明确证监会依法对银行间债券市场、交易所债券市场违法行为开展统一的执法工作。此前，由于中国银行间市场交易商协会(以下简称“**银行间市场交易商协会**”)为人民银行下属的自律组织，对银行间债券市场仅能开展自律监管，与证监会对公司债券领域的行政处罚相比，对相关违法行为监管和查处力度相对较弱，存在与交易所债券市场的监管套利空间。《统一执法意见》指出证监会可以依照《证券法》对所涉违法行为进行处罚。

我们期待下一步通过债券市场执法实践的不断发展看到证监会行使统一执法权的要求落到实处。

此外，2020年3月30日发布的《中共中央、国务院关于构建更加完善的要素市场化配置体制机制的意见》指出，将统一公司信用类债券信息披露标准，加强债券市场评级机构统一准入管理等。我们注意到，近年来，人民银行和证监会在共同致力于推动评级市场的统一监管，包括评级机构资质互认，监管机构间对信用评级机构和行业的监督管理信息共享以及对违规行为的联合执法和统一处罚。

在争议解决方面，2019年12月24日的《全国法院审理债券纠纷案件座谈会纪要》（征求意见稿）已明确，对具有还本付息这一共同属性的公司债券、企业债券、非金融企业债务融资工具适用相同的审判标准，确保案件审理的法律效果和社会效果相统一。我们认为，法院系统就所有种类的债券或债务融资工具适用统一的审判标准有利于对债券投资者的保护。

### 三、投资人保护和违约处置

相较于交易所上市的公司债券，银行间债券市场就债券持有人会议和受托管理人制度此前并无较为具体完整的规则制度。2019年12月发布的《银行间债券市场非金融企业债务融资工具违约及风险处置指南》等三项基础性制度以及2020年4月发布的全新《非金融企业债务融资工具公开发行注册工作规程（2020版）》要求在债券发行文件中进一步细化投资人保护、持有人会议规则和受托管理人制度等条款，例如引进了境外债券惯用的交叉违约条款。一旦发生债券违约，投资人可以根据上述条款约定的程序和方式主张权利，提高维权效率。

2019年12月31日，人民银行发布的《关于开

展到期违约债券转让业务有关事宜的公告》，以及2020年3月中国外汇交易中心暨全国银行间同业拆借中心发布的《全国银行间同业拆借中心银行间市场到期违约债券转让规则》为银行间债券市场到期违约债券转让相关事宜做出了明确规范。根据交易中心的公告，2020年4月17日，银行间市场达成首笔到期违约债券跨境交易。该笔中期票据因发行人进入破产重整程序提前到期，未按时兑付，构成债券到期违约。债券持有人为通过结算代理人进入银行间债券市场的境外资管产品。该笔交易为银行间债券市场到期违约债券的首笔跨境交易，通过引导专业资产处置机构、高收益债策略投资机构等多家主体参与，最终实现境外资管产品通过境内做市机构达成卖出交易，为境外投资机构提供了退出渠道。

### 四、对外开放

2019年以来，人民银行、证监会持续优化完善债券市场对外开放制度。国务院金融稳定发展委员会办公室于2019年7月20日宣布的金融业进一步对外开放的政策措施明确，允许外资机构在华开展信用评级业务时，可以对银行间债券市场和交易所债券市场的所有种类债券评级；允许外资机构获得银行间债券市场A类主承销牌照。2019年1月，银行间市场交易商协会接受标普信用评级（中国）有限公司注册，标志着国内信用评级行业正式对外开放。外资评级机构和承销商的引进有助于境外投资者更好地了解发行申请的披露文件，降低沟通成本。此外，人民银行也在致力于进一步简化境外机构入市流程、延长结算周期，为境外投资者提供更加便利的环境。

我们将持续关注并及时与我们的客户分享最新的进展。

附件一：

债券分类		发行人/监管机构	发行场所	存管机构
政府债券		中央政府发行	交易所债券市场	中证登
		地方政府发行	银行间债券市场	中央结算公司
			商业银行柜台债券市场	
中央银行票据		央行发行	银行间债券市场	中央结算公司
政府支持机构债券/政府支持债券		政府支持机构债券由中央汇金投资有限责任公司发行 政府支持机构债券/政府支持债券由铁道部发行	银行间债券市场	中央结算公司
金融债券		开发性金融机构和政策性银行、商业银行或非银行金融机构发行	银行间债券市场	中央结算公司
资产支持证券 (ABS)	信贷资产支持证券	发行载体为特定目的信托 银保监会审批业务资格和产品备案登记	主要在银行间债券市场	中央结算公司
	企业资产支持证券	发行载体为资产支持专项计划(证券公司及基金管理公司子公司管理) 中基协负责备案和负面清单管理	主要在交易所债券市场	中证登
公司信用类债券 (即公司信用债)	企业债券	中央结算公司受理, 中央结算公司、银行间市场交易商协会审核, 发改委注册	交易所债券市场 银行间债券市场	中央结算公司
	公司债券	上市公司或非上市公司均可发行 - 公开发行: 证券交易所负责受理、审核, 并报证监会履行发行注册程序 - 非公开发行: 交易所核准, 证券业协会备案	交易所债券市场	中证登
	可转换公司债(含可分离可转债)	上市公司或非上市公司均可发行 - 公开发行: 证券交易所负责受理、审核, 并报证监会履行发行注册程序(注: 目前交易所尚未正式实施) - 非公开发行: 交易所确认是否符合挂牌条件	交易所债券市场	中证登
	可交换公司债	- 上市公司、股票公开转让的非上市公众公司股东发行 - 公开发行: 证券交易所负责受理、审核, 并报证监会履行发行注册程序 - 非公开发行: 交易所核准, 证券业协会备案	交易所债券市场	中证登
	非金融企业债务融资工具 主要包括: ● 短期融资券(CP) ● 超短期融资券(SCP) ● 中期票据(MTN) ● 非公开定向债务融资工具(PPN) ● 资产支持票据(ABN)	具有法人资格的非金融企业发行 在银行间市场交易商协会注册	银行间债券市场	上清所

	<ul style="list-style-type: none"> <li>● 项目收益票据 (PRN)</li> <li>● 中小企业集合票据 (SMECN)</li> <li>● 绿色债务融资工具 (GN)</li> <li>● 其他创新品种</li> </ul>		
<b>熊猫债券</b>	境外机构(外国政府类机构、国际开发机构、境外合法注册的金融机构法人和非金融企业法人)发行 银行间债券市场：央行核准，在银行间市场交易商协会进行事先申请注册 交易所债券市场：适用公司债券规则	主要在银行间债券市场、交易所债券市场	中央结算公司 上清所 中证登
<b>同业存单</b>	存款类金融机构(政策性银行、商业银行、农村合作金融机构以及央行认可的其他金融机构)发行	银行间债券市场	上清所

### 机构名称缩写一览：

央行：中国人民银行

银保监会：中国银行保险监督管理委员会

证监会：中国证券监督管理委员会

发改委：中国国家发展和改革委员会

中央结算公司：中央国债登记结算有限责任公司

上清所：银行间市场清算所股份有限公司

中证登：中国证券登记结算有限责任公司

中基协：中国证券投资基金业协会

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## Financial

### Trends in China's Bond Market Following the Implementation of New Securities Law

By January 2020, the balance of bonds under custody in the China market had reached a total value of RMB 100.4 trillion, making China's bond market the second largest in the world in terms of market size. The tradable products include treasury bonds, local government bonds, financial bonds, corporate credit bonds (i.e. corporate bonds, enterprise bonds and non-financial enterprise debt financing instruments), negotiable certificates of deposit and panda bonds (see Appendix I: Major Tradable Products in China's Bond Market). On March 11, 2020, in the Q&A session jointly held by the People's Bank of China (PBOC) and the China Securities Regulatory Commission (CSRC) with respect to making the bond market serve the real economy ("Q&A"), the regulators provided responses in three key areas related to the China Interbank Bond Market (CIBM): market supervision and regulation, investor protection, and market opening up. This article seeks to briefly update and summarize the observations of the recent trends in legislative and law enforcement development of the bond market following the implementation of the new Securities Law.

#### I. Governing Law

The Q&A clarified the governing law in the

interbank bond market following the implementation of the new Securities Law, stating that the issuance, trading, registration, custody, settlement of financial bonds and non-financial enterprise debt financing instruments, both of which are issued and traded in the interbank market, are still governed by the existing regulations and rules formulated by the PBOC and its designated institutions in accordance with the *Law of the People's Republic of China on the People's Bank of China*. Underwriters (such as commercial banks) and intermediary service providers (such as credit rating agencies) still conduct businesses on the interbank bond market in accordance with existing laws and regulations.

The above statement shows that though in theory, the securities defined in the new Securities Law should include financial bonds and non-financial corporate debt financing instruments issued and traded in the interbank market, therefore the principles and relevant provisions of the new Securities Law should be applicable to the above bonds or debt financing instruments, our observation is that, based on a pragmatic stance, the Chinese government has decided to maintain the current regulatory regime in the interbank bond market in terms of bond issuance, trading, registration, custody and settlement, for a certain

period of time. It is clear that the interbank bond market is still regulated according to the existing rules and regulations established before the implementation of the new Securities Law, that is, the new Securities Law does not apply to interbank bond market to the extent governed by the existing rules and regulations.

## **II. Unified Law Enforcement**

That fact that the rules and regulations governing bond issuance, trading, registration, custody and settlement in the interbank bond market remain unchanged does not contradict the Chinese government's pragmatic approach to require the collaboration under a unified coordination mechanism among different regulatory agencies supervising different markets, and further, to require the unification of the law enforcement authorities and activities in both the interbank bond market and the exchange bond market, even though the regulations governing the two markets are separate.

The PBOC, the CSRC and the National Development and Reform Commission (NDRC) jointly issued the *Opinions on Further Strengthening the Law Enforcement in the Bond Market* ("Opinions on Unified Law Enforcement") in December 2018, which clarifies that it is the CSRC which should exercise unified law enforcement power over both the interbank bond market and the exchange bond market. Previously, since the National Association of Financial Market Institutional Investors (NAFMII) is just a self-regulatory organization under the PBOC, it can only conduct self-regulatory supervision of the interbank bond market. Compared with administrative penalties imposed by the CSRC in relation to corporate bonds, the supervision and investigation of relevant violations by the NAFMII are relatively weak, which creates a possibility for regulatory arbitrage in both markets. The Opinions on Unified Law

Enforcement point out that the CSRC may penalize relevant violations in accordance with the Securities Law. We look forward to more enforcement actions by the CSRC in the future along with the continuous development of law enforcement practices in the bond market.

In addition, pursuant to the *Opinions of the CPC Central Committee and the State Council on Building a More Improved System and Mechanism for Market-oriented Allocation of Elements* issued on March 30, 2020, the information disclosure standards for corporate credit bonds will be unified, and the unified entry requirements for rating agencies in the bond market will be further improved. Of note, in recent years, the PBOC and the CSRC have been working together to promote the unified regulation of the rating market, including mutual recognition of the qualifications of rating agencies, information sharing on supervision and management of credit rating agencies and industries among regulators, and joint law enforcement actions over and unified penalties on violations.

In terms of dispute resolution, the *Meeting Minutes of National Courts' Trial of Cases Concerning Bond Disputes (Consultation Paper)* issued on December 24, 2019 provide that same standards for trial apply to corporate bonds, enterprise bonds and non-financial enterprise debt financing instruments, all of which has a common feature of repayment of principal with interest, so as to ensure that the legal consequences and social impact arising from the trial of relevant cases are consistent. We believe that the application of uniform standards for trial of all types of bonds or debt financing instruments by the courts would help to protect bond investors.

## **III. Protecting Investors and Handling Bond Defaults**

Unlike corporate bonds listed in stock exchanges, previously there were no detailed and comprehensive rules or policies with respect to bondholders' meetings and bond trustee for bonds issued in the interbank bond market. The three basic legal documents issued in December 2019 including the *Guidelines on the Handling of Defaults and Risks with Respect to Non-Financial Enterprise Debt Financing Instruments* as well as the *Procedures for the Public Offering and Registration of Non-Financial Enterprise Debt Financing Instruments (Version 2020)* released in April 2020 require to further refine the terms regarding investor protection, bondholders' meetings and bond trustee in the bond issuance documents, such as incorporating the cross-default clause that is commonly used in overseas bond markets. Upon the occurrence of any bond default, investors can assert their rights in accordance with the procedures and methods stipulated in the aforesaid clauses, thereby improving the efficiency of creditor protections.

The *Announcement on Matters Related to the Business of Transferring Default Maturity Bonds* issued by the PBOC on December 31, 2019 and the *Rules of the National Interbank Funding Center on the Transfer of Default Maturity Bonds in the Interbank Bond Market* issued by the China Foreign Exchange Trade System (CFETS, also known as the National Interbank Funding Center, NIFC) in March 2020 provide detailed rules on matters related to the transfer of default maturity bonds in the interbank bond market.

According to the announcement of the CFETS, the first cross-border transfer of matured defaulted bonds in the interbank bond was completed on April 17, 2020. The relevant medium-term note reached maturity in advance as the issuer entered bankruptcy reorganization proceedings and was unable to repay the principal and interest on time, thereby generating default on maturity. The bond holder was a

foreign asset management product (AMP) trading in the interbank bond market via the settlement agency. This is the first sale of matured defaulted bonds by a foreign bond holder in the interbank bond market, which conducted its exit via a domestic market making institution and was facilitated by involvement of a variety of institutions, such as specialized asset disposal institutions and investment institutions with high-yield bond investment strategies.

#### **IV. Opening Up for Foreign Investors**

Since 2019, the PBOC and the CSRC have been optimizing and improving the opening up of the bond market. On July 20, 2019 the Financial Stability and Development Committee of the State Council announced several measures to further open up China's financial sector, which explicitly allow foreign institutions to carry out bond rating business with respect to all kinds of bonds traded in the interbank bond market and the exchange bond market while conducting credit rating business in China. Foreign institutions are also permitted to obtain the type-A main underwriter license in the interbank bond market. In January 2019, S&P Global Rating (China) Co., Ltd. successfully registered with the NAFMII, marking the official opening up of the domestic credit rating industry for foreign investment. The introduction of foreign-invested rating agencies and underwriters may help foreign investors better understand the disclosure documents required for the bond issuance applications and reduce the related communication costs. Additionally, the PBOC is also committed to further simplifying the entry requirements for foreign institutions and extending the settlement cycle, thereby providing a more convenient environment for foreign investors.

We will continue to monitor the situation and keep our clients apprised of any important developments.

Appendix I:

Type of Bond		Issued by / Regulated by	Market for Issuance	CSD
<b>Government Bonds</b>		Issued by central government or local government	Exchange Market	CSDC
			CIBM	CCDC
			Counter Market	
<b>Central Bank Bills</b>		Issued by PBOC	CIBM	CCDC
<b>Government-Supporting Institution Bonds / Government Backed Bonds</b>		Government-Supporting Institution Bonds issued by Central Huijin Investment Ltd. Government Backed Bonds issued by the Ministry of Railways	CIBM	CCDC
<b>Financial Bonds</b>		Issued by development financing institutions, commercial banks or non-bank financial institutions	CIBM	CCDC
<b>ABS</b>	Credit ABS	Issued by special purpose trusts - Reviewed and approved by the CBIRC for business qualification and product filing	Mainly in the CIBM	CCDC
	Enterprise ABS	Issued by asset-backed special plans (managed by securities companies and subsidiaries of fund management companies) - Filed with and negative list administrated by the AMAC	Mainly in the CIBM	CSDC
<b>Corporate Credit Bonds</b>	Enterprise Bonds	Issued by legal-person enterprises - Accepted by CCDC, reviewed by CCDC & NAFMII and then registered by NDRC	Exchange Market CIBM	CCDC
	Corporate Bonds	Issued by listed or listed companies - For public offering: accepted by stock exchanges and registered with the CSRC - For private offering: approved by stock exchanges and filed with the SAC	Exchange Market	CSDC
	Convertible Corporate Bonds (including Separable Convertible Bonds)	Issued by listed or unlisted companies - For public offering: accepted by stock exchanges and then registered with the CSRC (Note: having not been implemented at the exchange level) - For private offering: stock exchanges to confirm whether bonds are eligible to be listed	Exchange Market	CSDC
	Exchangeable Corporate Bonds	Issued by shareholders of listed companies or companies listed on the National Equities Exchange and Quotations - Public offering: accepted by stock exchanges and then registered with the CSRC - Private offering: approved by stock exchanges and filed with the SAC	Exchange Market	CSDC
	Non-Financial Enterprise Debt Financing Instruments ● Short Term Financing Bonds (i.e. Commercial Paper, CP) ● Super Short-Term Commercial Paper (SCP) ● Medium-Term Note (MTN) ● Private Placement Note (PPN) ● Asset-Backed	Issued by legal-person non-financial enterprises - Registered with NAFMII	CIBM	SCH



	<ul style="list-style-type: none"> <li>Note (ABN)</li> <li>● Project Return Note (PRN)</li> <li>● Small and Medium-Sized Enterprise Collective Note (SMECN)</li> <li>● Green Debt Financing Instrument (i.e. Green Note, GN)</li> <li>● Other innovative bond products</li> </ul>			
<b>Panda Bonds</b>		<p>Issued by foreign institutions such as foreign government-type institutions, international development institutions, legally incorporated overseas financial institutions with or without legal person status</p> <ul style="list-style-type: none"> <li>- If issued in interbank market: approved by the PBOC and then registered with the NAFMII</li> <li>- If issued in exchange market: same as corporate bonds.</li> </ul>	Mainly in the CIBM and the Exchange Market	CCDC SCH CSDC
<b>Negotiable Deposit Certificates of</b>		<p>Issued by deposit-type financial institutions, such as policy banks, commercial banks, rural cooperative financial institutions and other financial institutions recognized by the PBOC</p>	CIBM	SCH

**List of Abbreviations:**

ABS: Asset-Backed Securities  
 AMAC: Asset Management Association of China  
 CBIRC: China Banking and Insurance Regulatory Commission  
 CCDC: China Central Depository & Clearing Co., Ltd.  
 CIBM: China Interbank Bond Market  
 Counter Market: Counter Market of Commercial Banks  
 CSD: Centralized Securities Depository  
 CSDC: China Securities Depository and Clearing Corporation Limited  
 CSRC: China Securities Regulatory Commission  
 NAFMII: National Association of Financial Market Institutional Investors  
 NDRC: National Development and Reform Commission  
 PBOC: People's Bank of China  
 SAC: Securities Association of China  
 SCH: Shanghai Clearing House

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